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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-10

EXXON CORPORATION AND
PHILLIPS PETROLEUM COMPANY,
Appellants,

v.

GOVERNOR OF THE STATE OF MARYLAND, ET AL.,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

JURISDICTIONAL STATEMENT

Appellants Exxon Corporation and Phillips Petroleum Company appeal from a judgment of the highest court of the State of Maryland upholding a Maryland statute against appellants' contention that key provisions thereof violate the federal constitution. The federal questions were properly presented and are substantial.[1]

[1] Separate appeals are being filed by Continental Oil Company and its subsidiary Kayo Oil Company, Gulf Oil Corporation, Shell Oil Company, Commonwealth Oil Refining Company, Inc. and its subsidiary Petroleum Marketing Corporation, and Ashland Oil, Inc., each of which filed separate complaints below, but a Joint Appendix is being used by all appellants.

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland containing the judgment of that court reversing the judgments of the Circuit Court for Anne Arundel County is officially reported at 279 Md. 410 (advance reports) and unofficially at 370 A.2d 1102 (advance reports). The supplemental opinion of the Court of Appeals on motions for reconsideration and stay of judgment is reported at 279 Md. 456 (advance reports). The Circuit Court for Anne Arundel County filed two opinions, neither of which has been officially reported. Copies of all four opinions are filed herewith under separate cover as Appendices A (pp. 1a-44a), B (pp. 45a-48a), C (pp. 49a-51a) and D (pp. 53a-134a), respectively.

JURISDICTION

The opinion of the Court of Appeals of Maryland upholding the validity of the challenged statute and specifically rejecting appellants' contentions was filed on February 18, 1977. Motions for reconsideration and for a stay of mandate were timely filed and denied in a supplemental opinion filed April 13, 1977. On that date the Court of Appeals issued its mandate to the Circuit Court to dismiss the complaints. The notices of appeal to this Court (reprinted in Appendix E) were filed on June 27, 1977 with the clerk of the Maryland Court of Appeals and with the clerk of the Circuit Court for Anne Arundel County, the court possessed of the record pursuant to Rule 877 the Maryland Rules of Procedure, Md. Anno. Code (1957) (1977 Repl. Vol.).

Jurisdiction is conferred on this Court by 28 U.S.C. §1257(2). *Reconstruction Finance Corp. v. Beaver County*, 328 U.S. 204 (1946); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921); *Western Turf Ass'n v. Greenberg*, 204 U.S. 359 (1907).

STATUTES INVOLVED

Chapter 854, Laws of Maryland 1974, was amended by Chapter 608, Laws of Maryland 1975, and codified in the Maryland Annotated Code (1957), Art. 56, §157E (1972 Repl., Vol. 1976 Cum. Supp.). These chapters ("the Act" or "the Maryland Act") added the following provisions to the Motor Fuel Inspection Law:

> "(B) After July 1, 1974, no producer or refiner of petroleum products shall open a major brand, secondary brand or unbranded retail service station in the State of Maryland, and operate it with company personnel, a subsidiary company, commissioned agent, *or under a contract with any person, firm or corporation, managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer.*
>
> "(C) After July 1, 1975, no producer or refiner of petroleum products shall operate a major brand, secondary brand, or unbranded retail service station in the State of Maryland, with company personnel, a subsidiary company, commissioned agent, *or under a contract with any person, firm or corporation managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer.*
>
> "(D) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied.
>
> "(F) Every producer, refiner or wholesaler of petroleum products shall apportion uniformly all gasoline and special fuels to all retail service station dealers during periods of shortages on an equitable basis, and shall not discriminate among the dealers in their allotments."

(The italicized provisions are those added by Chapter 608 of the Laws of 1975.)

The pertinent provisions of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. §13, (sometimes hereinafter referred to as Section 2 of the Robinson-Patman Act) are as follows:

> "§2(a). It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . .
>
> "(b). Provided, however, That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

Other pertinent provisions of Maryland law will be found in Appendix F to this Jurisdictional Statement.

QUESTIONS PRESENTED

1. Does the requirement of Paragraph (D) of the Maryland Act that price reductions by suppliers of petroleum products to any dealers supplied in the state be extended uniformly to all such dealers conflict with Sections 2(a) and 2(b) of the Robinson-Patman Act and impair the balance established by Congress between the two statutes regulating pricing practices, the Sherman Act and the Robinson-Patman Act, in violation of the Supremacy Clause of the federal constitution?

2. Does the Act, which flatly prohibits the operation of retail service stations within the State of Maryland by producers or refiners of petroleum products, constitute an undue burden on and an unlawful discrimination against interstate commerce in violation of the Commerce Clause of the federal constitution, particularly when all products covered by the Act are produced and refined outside the State?

STATEMENT OF THE CASE

The Federal Questions Are Properly Presented. The federal questions presented by this appeal were first raised in the bill of complaint filed by appellant Exxon on June 17, 1974 in the Circuit Court for Anne Arundel County, Maryland. Paragraph 10 of the complaint included the following two subparagraphs (E. 263):[2]

> "g. The Act discriminates against and unduly burdens interstate commerce and is invalid under the Commerce Clause of Article I, §8 of the United States Constitution.
>
> "i. Paragraph D of the Act conflicts with 15 U.S.C. §13 (the Robinson-Patman Act) and is therefore invalid under the Supremacy Clause of Article VI of the United States Constitution."[3]

---

[2] "E" references as used herein are to the Joint Record Extract filed in the Court of Appeals of Maryland.

[3] Identical provisions are contained in the complaint filed by Phillips. Paragraph 22 of the Exxon complaint further alleged (E. 267): "The requirement of Paragraph D of the Act that all producers, refiners, and wholesalers of petroleum products 'extend all voluntary allowances uniformly to all retail service station dealers supplied' conflicts with both the spirit and the language of 15 U.S.C. §13 (the Robinson-Patman Act) and Article 83, §38, Annotated Code of Maryland (1973 Cumulative Supplement) (part of the Maryland anti-trust law). Under both the federal and state anti-trust laws, unlawful price discrimination can only result from a price difference which adversely affects competition. Paragraph D of the Act requires all allowances to be made on

Subsequent to the filing of the original complaint by Exxon, six other oil companies filed similar complaints. Defendants in all cases were state officials charged with enforcement of the Act. Thereafter motions for partial summary judgment were filed by Shell, Exxon and Gulf. On October 14, 1975, the Circuit Court granted partial summary judgment holding Paragraph (D) invalid on the ground that it invaded a field preempted by Congress and was in conflict with Section 2(b) of the Robinson-Patman Act.

The case thereafter went to trial on the other issues. On January 27, 1976, the Circuit Court entered judgment for the plaintiffs (App. D, p. 134a), holding Paragraphs (B) and (C) to be unconstitutional on a number of grounds, although rejecting plaintiffs' contention that those provisions unduly burdened interstate commerce (App. D, p. 123a). The court reaffirmed its conclusion that Paragraph (D) was invalid in the light of the Robinson-Patman Act.

On defendants' appeal to the Court of Appeals of Maryland, plaintiffs below renewed the constitutional arguments presented to the trial court. The Court of Appeals reversed the judgment of the Circuit Court, holding that all provisions of the Act were constitutional. In particular, the Court rejected plaintiffs' contention that Paragraphs (B) and (C) violated the Commerce Clause and that Paragraph (D) was preempted by the Robinson-Patman Act and the Sherman Act.

Thus, the federal questions presented here were raised by plaintiffs below at all stages of the case in the Maryland courts and were actually decided by the Maryland trial and appellate courts. Since the highest court of Maryland sustained the validity of the Maryland Act against federal constitutional attack, this appeal is properly here under 28 U.S.C. §1257(2).

a state-wide basis regardless of any rationale or justification for the granting of any form of allowance on a more limited geographic basis. This provision of the Act therefore conflicts with and is preempted by the federal law."

Retail Petroleum Marketing in Maryland. No crude oil is produced or refined[4] into motor fuel in the State of Maryland. (App. A, p. 19a). Consequently, all motor fuel sold in the State is transported into the State by pipeline, vessel or truck and distributed to retail outlets from storage tanks located in Maryland or neighboring states for sale directly to consumers.

Consumers may purchase motor fuel from two basic categories of retail outlets: major brand stations and private brand stations.[5] Major brand stations generally are characterized by the sale of advertised brand name products, the availability of repair services, and the acceptance of credit cards. Private brand stations offer products bearing a brand name which is not widely advertised, offer limited or no repair services, accept no credit cards, and normally sell gasoline at prices below those of major brand stations. (App. D, 98a-99a).

As of July 1, 1974 there were approximately 3800 retail gasoline stations in the State of Maryland of which all but 245, or approximately 94 percent, were operated by independent retail dealers. (E. 70-71). 209 of the 245 stations were company-operated stations (i.e., operated by the company with its own employees and under its own brand name) of producers or refiners, 124 by major oil companies and 85 by non-major compan-

[4] Since all the producing companies which operate service stations in Maryland are also refiners, hereinafter "producers and refiners" are sometimes referred to simply as "refiners."

[5] In its supplemental opinion, the Maryland Court of Appeals defined the term "retail service station" as used in Paragraphs (B) and (C) of the Maryland Act to include "gas only" stations which do not offer a full line of automotive services to the motoring public, as well as the conventional service stations. (App. B, pp. 46a-47a).

ies. (E. 70-71).[6] Appellant Exxon, as of July 1, 1974, had 532 retail outlets in Maryland, of which 36 were company operated, and Phillips as of October 1, 1975, had 121 of which 13 were company operated. (E. 76-77, 123).

Facts Relating to the Robinson-Patman Act Issue. Exxon, as well as other major suppliers which market primarily through independent dealers, recognize certain geographic areas in Maryland and elsewhere within which they identify competitive markets for sales of gasoline to their dealers. Some of the trading areas cover geographic areas which cross state boundaries into adjoining jurisdictions. Within such competitive markets, or "trading areas" as they are known in the industry, in order to meet competition from other suppliers, a supplier may from time to time temporarily reduce its wholesale prices or grant temporary allowances to its dealers. These allowances are restricted to the dealers who are offered price reductions from other suppliers or who need them in order to compete with dealers who are receiving price reductions from suppliers competing with the suppliers granting the allowances. The allowances are not extended to all dealers within the State of Maryland. (E. 89, 100, 108).

Facts Relating to the Commerce Clause Issue. The appellants, Exxon and Phillips, promote competition in the marketing of gasoline and the related service station services in Maryland by operating some company-operated stations which compete with other major company-operated stations, with independent dealers of the various major brands, and with the company-operated outlets of various smaller refiners (e.g. Ashland, Petroleum Marketing and Kayo). The

[6] The designation of "major" and "non-major" producers and refiners is that of the Lundberg Survey, Inc., a highly regarded and widely used industry statistical organization. (E. 401).

Maryland statute, if allowed to stand, would create a virtual marketing enclave for local independent dealers by barring *all* company-operated outlets of refiners and producers, all of which ship their motor fuel in interstate commerce.

Because private brands of motor fuel lack brand name acceptance, they must be sold at prices lower than the major brands. Control of the retail price is critical for private brand stations and can only be obtained legally through company-operated outlets. For that reason the vast majority of private brand stations (whether or not affiliated with a producer or refiner) are company-operated. (App. D, p. 99a, E. 383, 453, 456, 488-489, 492, 499). In contrast, most major brand stations are operated by independent retail service station dealers.

Because company-operated stations are vital to private brand marketing, Paragraphs (B) and (C) of the Maryland Act would make it economically infeasible for refiners marketing such brands to continue retail station operations in the State of Maryland. (E. 388-389, 456-458, 492).[7] The record indicates that plaintiff-appellants Ashland (Bi-Lo, Red Head, and Payless brands), Petroleum Marketing (Scot brand), and Kayo (Kayo brand), which operate exclusively through company-operated stations in Maryland, would have to abandon the sale of motor fuel at retail in the Maryland market if they could not operate their own stations.

[7] In reversing the trial court, the Maryland Court of Appeals noted that as to some of these operators no final corporate board decision had been made to withdraw from the Maryland retail market if the Act became effective. From this fact, the court drew the conclusion that it might still be possible for these private brand operators to sell their products to the public in Maryland through independent dealers. (App. A, pp. 23a-24a). This conclusion was, however, contrary to the undisputed testimony that such marketers could not operate profitably in this manner. (App. D, pp. 103a, 109a, 111a, E. 388-389, 456-458, 492).

(App. D, pp. 103a, 109a, 111a, 112a, 119a, E. 389, 457, 492). This would have the effect of shutting off their interstate shipments from outside Maryland to these stations in Maryland.

The Act also eliminates independent marketers now operating in Maryland which contemplate strengthening their businesses by means of "backward integration", that is, integrating backward into refining, or crude production. The effect upon Hudson Oil Company, an aggressive, totally company-operated independent marketer which sells its gasoline in 36 states including Maryland, is illustrative. At the moment Hudson's new refinery comes "on stream," thereby strengthening the company's competitive posture, it will be forced out of the State by the terms of the Act. (App. D, p. 112a, E. 498-500).[8]

In addition to eliminating all existing retail competitors which are producers or refiners, the Act creates substantial barriers to entry for potential new competitors attempting to bring motor fuel into Maryland for sale in the retail market. The direct control permitted through company-operated stations is essential for any marketer to enter a market where it has little or no prior brand recognition. There are 32 non-major oil companies which operate refineries and which do not presently market in Maryland, all of which would be unable to enter the Maryland market. (App. D, p. 130a, E. 401).

Major oil companies, such as Exxon and Phillips, operate retail stations for a variety of purposes, including gaining entry into new geographic markets, dealer training, testing innovations in marketing methods and equipment, and engaging in competition in a more extensive range of automotive repair services and parts, as in the case of Exxon's "Car Care

[8] Subsequent to the trial, Hudson apparently did acquire a refinery and is now subject to the Act.

Centers," which require larger investments than most service stations. (E. 358-360). The Maryland Act's prohibition of such operations impairs the ability of such interstate concerns to compete effectively in the product and service markets involved.

In practical effect, the Maryland Act will restrict the interstate channels through which petroleum products can flow into the State of Maryland and, by the elimination of existing and potential interstate competitors, lessen competition in the State.

REASONS FOR NOTING PROBABLE JURISDICTION

By prohibiting price differentials which do not injure competition and by depriving sellers of the "meeting competition" defense allowed under Section 2(b) of the Robinson-Patman Act, Paragraph (D) of the Maryland Act upsets the delicate balance which Congress established between the competitive philosophy of the Sherman Act and the competitive restraints embodied in the Robinson-Patman Act to protect small businesses, and frustrates the congressional purpose to foster competition. The holding of the Maryland Court of Appeals that Paragraph (D) does not violate the Supremacy Clause of the federal constitution was based on a construction of Section 2 of the Robinson-Patman Act which has been flatly rejected by the federal courts as well as by the Federal Trade Commission and the Department of Justice. Furthermore, Paragraph (D) directly conflicts with Section 2 of the Robinson-Patman Act in that it requires uniform price allowances statewide under circumstances where the necessity to meet competition is confined to a narrower area.

Paragraphs (B) and (C) discriminate against and burden interstate commerce by disrupting the marketing operations of Exxon and Phillips and other major

brand suppliers in which company operated service stations play an essential role. Moreover, these provisions make it difficult or impossible for interstate private brand refiners and suppliers which cannot effectively compete except through stations that they operate themselves, to continue in the Maryland market, and impede the entry into the market of new interstate commpetitors which must operate their own stations in order to gain a foothold.

The questions thus presented under the Supremacy Clause and the Commerce Clause are, we submit, clearly substantial. And their importance far transcends the Maryland market, since there is a nation-wide movement to enact similar statutes in other states. Thus far laws containing restrictions on refiner operation of service stations have been passed by the state legislatures of Delaware and Florida, and by the Council of the District of Columbia; laws requiring uniform prices or allowances have been passed by the legislatures of Delaware, California and Rhode Island, and by the Council of the District of Columbia.[9] During the last four years proposals to prohibit or limit company operation of service stations or to require

[9] The Florida law (Fla. Stat. §526.151), which limits producer or refiner company operations to 3% of the total number of stations in the state, was declared unconstitutional by a state trial court in *Exxon Corp. v. Conner*, Case No. 74-1449 (Cir. Ct., 2d Jud. Cir., Leon County, Fla. Jan. 23, 1975); no appeal was taken. The Delaware statute (Del. Code, Tit. 6, §§2905-2906 (1976 Cum. Supp.)) is presently under challenge in the state courts. The Rhode Island statute (R. I. Gen. Laws, Tit. 5, Chap. 52) and the California statute (Cal. Bus. & Prof. Code §§21200-21203), which require uniform pricing, are presently being tested in the federal courts; the California case is now before the Ninth Circuit, after the state law was held unconstitutional in the District Court, *Shell Oil Co. v. Younger*, 1976-1 CCH Trade Cases, ¶60,960 (N.D. Calif. 1976), appeal pending No. 76-2784 (9th Cir.). The law adopted by the Council of the District of Columbia is Bill No. 1-333.

uniform statewide pricing or allowances, or both, have been before the legislatures of a total of 33 jurisdictions, including those identified above which have adopted such proposals.[10] The trend in the most recently introduced bills has been toward provisions virtually identical with the Maryland Act. Such bills are likely to receive a strong stimulus if the decision of the Maryland Court of Appeals is allowed to stand.

I.

PARAGRAPH (D) OF THE MARYLAND ACT CONFLICTS WITH THE ROBINSON-PATMAN ACT AND UPSETS THE BALANCE BETWEEN LAWFUL AND UNLAWFUL PRICE DIFFERENTIALS WHICH CONGRESS HAS ESTABLISHED IN THE SHERMAN AND ROBINSON-PATMAN ACTS.

A. *Paragraph D is inconsistent with the Robinson-Patman Act on its face.*

The Maryland statute requires that all discounts be uniform without any consideration for whether a differential in prices would lessen or otherwise impair competition or tend to create a monopoly. Paragraph (D) of the Maryland statute provides that

> "Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied."

[10] Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Washington, and West Virginia. The New Hampshire Supreme Court, in an advisory opinion delivered to the state Senate on June 20, 1977, found that S. B. 75, which is "virtually identical" to the Maryland Act, would be constitutional provided it did not apply "retrospectively to the thirteen retail gasoline stations which are presently operated by suppliers."

The Maryland Court of Appeals held that such "voluntary allowances" are in fact discounts extended by suppliers to certain dealers to enable those dealers to meet competition. Yet under Paragraph (D) such competitive discounts are required to be uniform throughout the State.

This conflicts with the Robinson-Patman Act in two respects. In the first place, the prohibition against non-cost justified price discrimination in Section 2(a) of that act applies only:

> "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition."

Where price discrimination does not impair competition in any of these ways, it is not unlawful, because Congress recognized that except in special circumstances price differences generally promote competition rather than impair it.

In the second place, the flat Maryland requirement of uniformity ignores the "meeting competition" exception in Section 2(b) of the Robinson-Patman Act, which permits a seller to show "that his lower price . . . was made in good faith to meet an equally low price of a competitor . . . ." The Maryland statute on its face does not recognize any such exception.

Thus, the Maryland Act is inconsistent with the federal law. The federal law, of course, governs as to all sales subject to the Robinson-Patman Act — and all the sales to Maryland service stations are subject to that statute, as *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231 (1951), clearly establishes. All motor fuel sold at Maryland service stations comes from refineries outside Maryland and is shipped directly either to the service stations or to bulk storage facilities in Maryland from which it is delivered to the service stations. The

Standard Oil case squarely holds (340 U.S. at 237-238) that sales from bulk storage facilities as well as sales directly from out-of-state refineries to in-state service stations are "in interstate commerce" and "are well within the jurisdictional requirements of the [Robinson-Patman] Act . . . Such temporary storage of the gasoline as occurs within the Detroit area does not deprive the gasoline of its interstate character."

The Maryland state-wide uniform allowance requirement also goes beyond what is permitted under the Section 2(b) proviso, the meeting of "individual competitive situations." *Federal Trade Commission v. A. E. Staley Mfg. Co.*, 324 U.S. 746, 753 (1945); *Federal Trade Commission v. National Lead Co.*, 352 U.S. 419, 431 (1957); *Federal Trade Commission v. Sun Oil Co.*, 371 U.S. 505, 517 (1963). This proviso, in allowing a price reduction to meet the lower price of a competitor, does not permit decreasing the price beyond the areas affected by the competitor's lower price. Thus, in *In re Forster Mfg. Co.*, 68 F.T.C. 191, 194-195, 198 (1965), aff'd *sub nom. Forster Mfg. Co. v. Federal Trade Commission*, 361 F.2d 340 (1st Cir. 1966), cert. denied, 385 U.S. 1003 (1967), a 10 percent discount offered uniformly throughout the entire Pittsburgh area, accepted by 17 customers, was held not warranted by proof that a competitor had granted such a discount to three customers. This could not be regarded as action in good faith to meet the competitive offer. See also *Hampton v. Graff Vending Co.*, 478 F.2d 527, 535 (5th Cir.), cert. denied, 414 U.S. 859 (1973) (granting discounts uniformly to large and small buyers throughout areas not justified by competing discount to a large purchaser).

B. The Maryland Court's interpretation of the Robinson-Patman Act does not avoid the conflict between state and federal statutes, and itself is in conflict with the federal interpretation of the federal statute.

In an attempt to minimize the obvious conflict between Paragraph (D) of the Maryland Act and Section 2(b) of the Robinson-Patman Act, the Maryland Court of Appeals adopted an interpretation of the latter Act which is in conflict with the only federal appellate decision on the question as well as with the views of the Federal Trade Commission and of the Department of Justice.

In *Federal Trade Commission v. Sun Oil Co.*, 371 U.S. 505 (1963), this Court held that the Section 2(b) defense could be invoked only when the discriminatory price reduction was a response to a lower price of a seller's own competitor, and did not allow a price reduction by a seller-supplier because the buyer-retailer was faced with price cutting solely at the retail level. This Court left open, however, the case in which the competing retail service station "had received a price cut from its own supplier — presumably a competitor of Sun," which the Court characterized as "a different case, as to which we herein neither express nor intimate any opinion." 371 U.S. at 512, n. 7.

The Seventh Circuit in *Bargain Car Wash, Inc. v. Standard Oil Co. (Indiana)*, 466 F.2d 1163 (1972) (per Justice Clark and Judges Swygert and Stevens), finding it necessary to pass upon that question, concluded:

> "We are inclined to the view that the Section 2(b) defense is available to American if the lower price granted its individual dealer is made to meet an equally low price made by a competitor of American to an individual competitor of American's dealer." *Id.* at 1175.

To the same effect is *Bunty v. Shell Oil Co.*, 1972 CCH Trade Cases, ¶74,252. (D.Nev. 1972). See also *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993, 998 (10th Cir.), cert. denied, 380 U.S. 964 (1965). The court in *Bargain Car Wash* noted that the Federal Trade Commission was of the same view, quoting (466 F.2d at 1176, n. 9) from an FTC report directly on point, which concluded:

> "Consequently, we are of the opinion that a price reduction by one supplier to its customer which is reflected in the latter's retail price may be lawfully met by a comparable reduction by another supplier to its customer." *FTC Report on Anti-Competitive Practices in the Marketing of Gasoline*, 3 CCH Tr. Reg. Rep. ¶10,373 at 18,245 (1967).

A recent Department of Justice *Report on the Robinson-Patman Act*, p. 94 (1977), expresses the same view.

The Maryland Court of Appeals, while saying that the point is "not without doubt" (App. A, p. 37a), construed the statute differently, relying on the District Court ruling in *Enterprise Industries v. Texas Co.*, 136 F. Supp. 420 (D.Conn. 1955), reversed on other grounds, 240 F.2d 457 (2d Cir.), cert. denied, 353 U.S. 965 (1957). The *Enterprise* case, however, was cited by this Court in the *Sun* opinion (371 U.S. at 512) in support of the decision in that case, immediately after this Court's statement that it was expressing no opinion on the separate question in issue here. Obviously this Court did not regard *Enterprise* as authority on the undecided point.

The interpretation of the federal statute by the Maryland court thus presents a substantial question worthy of review both because the state decision is in conflict with decisions of federal courts and agencies and because the state court's interpretation of the federal statute is erroneous for the reasons indicated in the Federal Trade Commission report cited above. Thus the Maryland court's effort to construe the Robinson-

Patman Act so as to avoid a conflict with Paragraph (D) depends on its own erroneous construction of the federal statute.

C. *Paragraph (D) frustrates federal antitrust policy with respect to pricing practices as established by Congress in the Sherman and Robinson-Patman Acts.*

Paragraph (D) of the Maryland Act requires that allowances made to any dealer in Maryland be made uniformly to all dealers. But this conflicts with the congressional purpose of foster competition expressed in the Sherman and Robinson-Patman Acts:

> "For a seller constrained by law to reduce prices to *some* only at the cost of reducing prices to *all* may well end by reducing them to *none*. As the Federal Trade Commission recently recommended to Congress, 'The right to meet a lower price which a competitor is offering to a customer, when this is done in good faith, is the essence of competitive economy.' Anything less, we think, would move the price discrimination statute into irreconcilable conflict with the Sherman Act." *Report of the Attorney General's National Committee to Study the Antitrust Laws*, p. 181 (1955).

See the language of this Court to the same effect in *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231, 250.[11]

We respectfully submit that Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, is, in essence, a modification of the Sherman Act, carefully limited in such a way as not to apply except to transactions which may have the effect of substantially lessening competition. *Automatic Canteen Co. v.*

[11] "There is nothing to show a congressional purpose . . . to compel the seller to choose only between ruinously cutting its prices to all its customers to match the price offered to one, or refusing to meet the competition and then ruinously raising its prices to its remaining customers to cover increased unit costs."

Federal Trade Commission, 346 U.S. 61 (1953). Both Sections 2(a) and (b), as they now read, spell out this limitation and express the underlying Congressional policy. The Robinson-Patman Act was an attempt to reconcile two conflicting objectives — on the one hand, the encouragement of price competition embodied in the provisions of the Sherman Act, and on the other, the protection of small business enterprises from the impact of discriminatory pricing, first attempted in Section 2 of the Clayton Act. To that end, Section 2 was amended by the Robinson-Patman Act so as to define the extent to which Congress saw fit to limit the free market philosophy of the Sherman Act. For a history of the federal legislation dealing with price competition see the Department of Justice *Report on the Robinson-Patman Act*, pp. 101-148 (1977).

Section 2 of the Robinson-Patman Act thus represents a delicate adjustment of conflicting policies which has been hammered out after years of discussion and debate. The Circuit Court, recognizing that Congress has itself prescribed the accommodation between differing federal policies, cited *Connell Construction Co. v. Plumbers & Steamfitters Local No. 100*, 421 U.S. 616 (1975), where this Court, after holding that a union's collective bargaining agreement was subject to the federal antitrust laws, considered whether the State antitrust law might apply as well. The Court concluded that it could not, saying (at 636):

> "*In this area, the accommodation between federal labor and antitrust policy is delicate. Congress and this Court have carefully tailored the antitrust statutes to avoid conflict with the labor policy favoring lawful employee organization, not only by delineating exemptions from antitrust coverage but also by adjusting the scope of the antitrust remedies themselves.* [Citation omitted.] State antitrust laws generally have not been subjected to this process of accommodation. If they take

account of labor goals at all, they may represent a totally different balance between labor and antitrust policies. Permitting state antitrust law to operate in this field could frustrate the basic federal policies favoring employee organization and allowing elimination of competition among wage earners, and interfere with the detailed system Congress has created for regulating organizational techniques." (Emphasis added.)

So here, Congress by adopting the Robinson-Patman Act, balanced two conflicting national policies — encouragement of the free market by competitive pricing and protection of small business enterprise from destructive competition. Paragraph (D) is an attempt by the State of Maryland to cast the balance differently by eliminating the limitations which Congress was careful to place on its modification of the Sherman and Clayton Acts. If any such change is desirable, then clearly it is for Congress to make rather than for individual state legislatures to inject their own notions of policy into this sensitive area.

The purpose of Congress to foster price competition has been clear since the enactment of the Sherman Act. By limiting Section 2(a) of the Robinson-Patman Act to acts which might substantially lessen competition and by providing in Section 2(b) that suppliers charged with a violation of Section 2(a) of the Act could defend themselves by showing that a lower price was offered in good faith to meet the lower price of a competitor, Congress made certain that this basic policy should continue without impairment. The effect of the Maryland law is to frustrate that purpose, and this the Supremacy Clause clearly forbids. Cf. *Jones v. Rath Packing Co.*, ___ U.S. ___, 97 S. Ct. 1305, 51 L. Ed. 2d 604 (1977), which invalidated a state law which by imposing a stricter standard for labeling flour than did the federal Fair Packaging and Labeling Act would

have frustrated the Congressional purpose to facilitate value comparisons among similar products.

II.

PARAGRAPHS (B) AND (C) OF THE MARYLAND ACT, WHICH PROHIBIT PRODUCERS AND REFINERS FROM OPERATING SERVICE STATIONS IN MARYLAND, ARE INVALID UNDER THE COMMERCE CLAUSE.

Paragraphs (B) and (C) of the Maryland Act require *all* refiners or producers of petroleum products to cease operating all company-operated retail service stations in Maryland. The language of the statute is unequivocal: *"The station must be operated by a retail service station dealer."* Since there is no producing or refining in the State of Maryland, the practical effect of the statute is to eliminate altogether the competition of all interstate producers or refiners, both large and small, in the Maryland retail service station market and to require consumers to purchase substantially all their motor fuel requirements from local dealers. The question is whether such a statute imposes an unconstitutional burden on or discriminates against interstate commerce. Stated differently, the question is to what extent may a state exercise its legislative power to protect local retail service station dealers from the competition of producers and refiners which move their product into the state and sell it at retail through their own agents and employees?

A. *The Act imposes a significant burden on interstate commerce.*

In resolving this question, this Court examines the "practical effect" of the challenged statute in order to determine the extent to which it imposes a burden on or discriminates against interstate commerce. *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951); *Hunt v. Washington State Apple Advertising Commission*, 45 U.S.L.W. 4746, (U.S. June 20, 1977). This Court has

established that a state law may unconstitutionally impair interstate commerce: by interfering with the "natural functioning of the interstate market either through prohibition or through burdersome regulation," *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806 (1976); by regulating interstate commerce where regulation, if necessary, is more appropriate at the national level, *Cooley v. Board of Wardens of the Port of Philadelphia*, 12 How. 299 (1851), *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); and by discriminating against interstate commerce by protecting local businesses from foreign competition, *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976).

The practical effect of the Maryland Act in requiring the use of independent dealers to retail gasoline, to the exclusion of producers and refiners, is to deprive consumers of the benefits of competition from aggressive interstate competitors and to create a protected enclave for local independent dealers against competition from without the State. The Court of Appeals so acknowledged:

> "The State's expert witness conceded that the Act, by excluding certain partially integrated marketers, could in some respects be anti-competitive . . . ." (App. A, p. 15a).

The Maryland Act creates this environment insulated from competition in four distinct ways.

First, the Act, as noted above, reduces competition by barring Exxon, Phillips and other producers and refiners, now operating approximately 209 retail stations, from continuing to compete in the retail market in Maryland through company-operated stations.

Second, the Act makes it difficult for producers or refiners not currently distributing their products in the Maryland market ever to enter that market. Exxon's experience in entering the Florida market in 1962

illustrates this point. "This was a market that we'd never been in prior to 1962. We were unknown in the market at that time. We had no brand image. We were unable to attract dealers. Stores were unable to provide sufficient income to the dealer so Exxon elected to operate those stores on a company operated basis until such time we could build a volume through proper operation to the point that the dealer could make a living and at that time the stores were leased to dealers. . . . This was some five or six years later. . . . I would think less than five percent are company operated at this time." (E. 359).

If Exxon was unable to enter a new market without operating its own stations, marketers with less resources would have at least the same difficulty. Thus, there is every reason to believe, as the trial court found, that the 32 of the 37 partially integrated private brand marketers presently not selling their products in Maryland would be kept out by the new law. (App. D, p. 130a).

Third, the Maryland Act makes it economically prohibitive for integrated private brand marketers, including plaintiffs Petroleum Marketing, Ashland and Kayo, to continue marketing their products in Maryland. The testimony in this case established beyond doubt that marketers which sell brands of gasoline with little consumer recognition in a given market must retail their product at prices lower than those at which advertised brands are sold. (E. 488-489). They have tried dealer operations and found they cannot compete effectively because, *inter alia*, under the antitrust laws they cannot control the price of the products sold. (E. 453, 488-489, 499). Company-operated stations are the only viable marketing avenue for such marketers. Ashland's experience illustrates this point. Near its home territory in Ashland, Kentucky, it markets primarily through independent dealers because of

brand acceptance, while in markets distant from its home territory, such as Maryland, lack of such brand acceptance dictates that it market exclusively through company operated outlets. (E. 488-489).

Fourth, the Maryland Act inhibits private brand marketers of gasoline which are not currently producers or refiners from integrating backwards into refining or production of petroleum products or, alternatively, drives them out of the Maryland market if they do choose to integrate backwards. At the trial, Mary Hudson, president of Hudson Oil Company, which sells in 36 states exclusively through company-operated outlets (over 300 stations nationwide, including 5 in Maryland), testified that she was planning construction or purchase of a refinery. While her acquisition of a refinery would strengthen her competitive posture, she stated that if the Maryland Act is upheld, "we would have to dispose of our stations here in Maryland and, of course, we do not want to do that." (E. 500).

The total effect of the Maryland Act is to erect "an economic barrier protecting a major local industry against competition from without the State." *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951). Even if the provisions of the Maryland Act do not amount to a total exclusion of private brand competitors from the Maryland market, they still constitute a substantial burden on interstate commerce, since the practical effect is, at the very least, to increase operating costs, impair efficiency, and hamper the ability of producers and refiners of petroleum products to compete in interstate commerce. *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 781-782 (1945); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 143 (1970); *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976); *Lemke v. Farmers' Grain Co.*, 258 U.S. 50 (1922). "The common

thread of all these cases is that the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806 (1976); cf. *Hunt v. Washington State Apple Advertising Commission*, 45 U.S.L.W. 4746, 4751 (U.S. June 20, 1977).

Ironically, the burden of the statute falls most heavily on independent refiners and "non-major" oil companies. (E. 70-71). These companies furnish vigorous price competition, and their practical exclusion from the Maryland market will bear heavily on consumers. Appellants are also adversely affected by the elimination of their company-operated stations, which mode of operation is an important part of their marketing format.[12] Moreover, they are fully aware of the fact that if the Maryland Act is upheld, there is every likelihood that similar statutes will be enacted in other states. See pp. 12-13, *supra*. Furthermore, the prospect that each state legislature may adopt its own variations on the Maryland law is a chilling one, with drastic implications for any company's national marketing structure.

This Court looks particularly askance at state legislation which favors local business as against outsiders. *Nippert v. Richmond*, 327 U.S. 416 (1946); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525 (1949); *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951); *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976); *Hunt v. Washington State Apple Advertising Commission*, 45 U.S.L.W. 4746, (U.S. June 20, 1977). And such favoritism is not negated because the statute is not "discriminatory on [its] face", *Nippert* at 431.

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[12] Appellants' company-operated stations are used for various purposes, including, *inter alia*, entering new markets, training independent dealers, testing and developing marketing and equipment innovations for possible future use by independent dealers, and providing comprehensive auto repair services. (E. 136, 360).

In *Nippert*, this Court, in holding unconstitutional Richmond's tax on solicitors, recognized that the tax "may strike as heavily upon some Virginia solicitors . . . as it does upon others who come" from other states (327 U.S. at 432). In *Dean Milk*, 340 U.S. at 354, n. 4, this Court, in holding unconstitutional a local ordinance which required milk pasteurizers to be located within five miles of the City of Madison, Wisconsin, again recognized that it was "immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce." See also *Brimmer v. Rebman*, 138 U.S. 78, 82-83 (1891). Thus, even though the Maryland law would apply to the operation of service stations in Maryland operated by Maryland refiners, if there were any, this does not mean that there is no discrimination against or burden upon interstate commerce within the meaning of the decisions of this Court.

The Maryland court's view that the policy of the Commerce Clause would not be impaired in the absence of a physical impediment to entry is thus too narrow. The principle that a state may not impose economic barriers which favor local businesses is not limited to the situation where a product is physically barred from entry into the state, as was the milk in the *Dean* case. The drummer cases, of which *Nippert* is perhaps the most recent, demonstrate that state or local laws which give a competitive advantage to local merchants over out-of-state competitors are invalid even though there is no impediment to the physical delivery of the product into the state and no reason to believe that the law will lessen the total quantity of the products involved which will be shipped into the state. As the cases cited above demonstrate, this Court has held that the Commerce Clause is violated if interstate businesses are handicapped in competing with local traders, even though the

latter might (in the absence of other competition) be able to import enough goods to meet the entire demand.

Here the obvious and intended effect was to give the local dealers a substantial advantage. The twice repeated statement added to Paragraphs (B) and (C) of the Maryland Act in 1975 that

> "The station must be operated by a retail service station dealer"

demonstrates on its face that a principal object of the Act was to protect local dealers against competition from refiners all of whom are outsiders. The Circuit Court found that it was "designed to benefit one class of merchants to the detriment of another" (App. D, p. 131a) — and this will be its effect, as has been shown above. This Court has stated, however, that the "protection of local economic interests" does not justify an interference with interstate trade. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. at 531.

The Maryland Court of Appeals expressed the view that the Maryland Act was regulating a "wholly intrastate activity." (App. A, p. 18a). On the contrary, the sale of petroleum products which are transported into a state has been regulated by Congress not only under the antitrust laws (see Point I, *supra*, at 14 and *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231 (1951); *Federal Trade Commission v. Sun Oil Co.*, 371 U.S. 505 (1963)) but also in the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §751 *et seq.*, *inter alia*. In any event, where a state law has the effect of favoring local dealers over interstate competitors, an impermissible barrier to interstate commerce may be created even though its immediate impact may be upon conduct within the state. E.g., *Hood v. Du Mond, supra* (licensing milk receiving stations); *Nippert, supra* (tax on method of selling in state).

B. *The burdens which Paragraphs (B) and (C) impose on interstate commerce are not justified by benefits to legitimate local interests incapable of being achieved by less drastic means.*

In determining the constitutionality of a state law when challenged as a burden on interstate commerce, the Court applies the three-pronged balancing test stated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), and recently reaffirmed in *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 371 (1976):

> "[1] the extent of the burden that will be tolerated will . . . depend on the [2] nature of the local interest involved, and on [3] whether it could be promoted as well with a lesser impact on interstate activities."

The burdensome effects of the Maryland Act upon interstate commerce have been described above. *Supra* at 22-25. In order to justify the burdens on interstate commerce created by the Maryland law, there must be a showing of sufficient legitimate local interest. Less weight is given to the local interest in the balancing process when the law, as here, involves matters purely economic in nature, which are closer to the concerns which the Commerce Clause committed to Congress, rather than those concerning health, safety or fraud. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. at 531, *supra; Pike v. Bruce Church, Inc.*, 397 U.S. at 143, *supra; Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 442 (1960).

And even less weight should be given to the alleged local interest when, as here, the same public interest can be adequately safeguarded by measures much less drastic than prohibiting all refiner-operated service stations, including those so operated before the law was passed. "Inquiry whether adequate and less burdensome alternatives exist is, of course, important in discharge of the Court's task of 'accommodation' of conflicting local and national interests, since any

'realistic' judgment' whether a given state action 'unreasonably' trespasses upon national interests must, of course, consider the 'consequences to the state if its action were disallowed.'" *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 373 (1976). The Maryland court completely ignored the existence of less burdensome alternative means of accomplishing the State's objectives.

The conclusion of the Court of Appeals that there was a legitimate local interest is based on two findings: (1) that during the period of the gasoline shortage in 1973, some company-operated stations received greater allocations of gasoline than did dealer-operated stations, forcing many dealers out of business, and (2) that there was evidence that certain oil companies intended to increase the number of company-operated stations, from which the General Assembly might have concluded that this trend "if allowed to continue" could substantially decrease competition and lead to the control of that market by a few major oil companies. (App. A, p. 19a). These findings of the Court of Appeals, however, must be considered in the light of the Circuit Court's finding, and the State's concession on appeal, that retail marketing of petroleum products in Maryland is at present "highly competitive." (App. D, p. 99a, State's Brief at 7). Particularly under these conditions, neither finding justifies the drastic provisions of Paragraphs (B) and (C) of the Act.

Not only are less Draconian remedies available, they have already been enacted. The federal Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §751 *et seq.*, and regulations promulgated thereunder (10 C.F.R. Parts 210-211) provide for the allocation of supplies on a fair and equitable basis.[13] Moreover, Paragraph (F) of

[13] The Energy Policy and Conservation Act, §461, P.L. 94-163 (1975), has extended the operation of the Act through September 30, 1981.

the Maryland Act here involved also provides for uniform and equitable allocations in "periods of shortage." The court below in this case construed those standards as having the same meaning as the federal. (App. A, pp. 29a-32a). Certainly to require all refiners operating service stations in Maryland to stop operating them is an unnecessarily severe method of dealing with the allocation problem.

So, likewise, there are equally effective and much less drastic means of halting any perceived trend toward the conversion of dealer-operated stations to company operation. Maryland has already adopted legislation prohibiting arbitrary terminations of dealer operations. Maryland Gasoline Products Marketing Act, Md. Anno. Code (1975), Comm. L. Art. §11-304(c). See App. F, pp. 155a-161a for the provisions of this statute. Insofar as anticompetitive conduct is said to arise from the presence of company-operated stations — of which there is no evidence in this record — Maryland law parallels the federal antitrust laws; both proscribe retail price maintenance schemes, price discrimination and predatory pricing which affects competition. Cf. Maryland Antitrust Act, Md. Anno. Code (1975), Comm. L. Art. §11-201 *et seq.*; Maryland Unfair Sales Act, Md. Anno. Code (1975), Comm. L. Art. §11-401 *et seq.* The federal antitrust laws were recently amended to permit the attorney general of any state to bring a *parens patriae* suit on behalf of the residents of the state for violations of the Sherman Act. 15 U.S.C. §15c, 90 Stat. 1394 (1976).

In addition, Section 5 of the Federal Trade Commission Act, which now extends to unfair methods of competition and unfair or deceptive acts or practices "in or *affecting* interstate commerce" (15 U.S.C. §45, as amended, Jan. 4, 1975, 88 Stat. 2200), has recently been applied to alleged unfair provisions in retail service station transactions. *Phillips Petroleum Co.*, 84 F.T.C.

1666 (1974) (consent order for settlement purposes only with no admission or finding of violation); *Standard Oil Co. (Ohio)*, Dkt. 8910, CCH Trade Reg. Rep. ¶20,134 (proposed complaint, 1972) ¶20,208 (complaint issued, 1973). And the Commission was recently granted increased enforcement power by Congress to bring civil actions against persons who engage in acts which the Commission has determined to be unfair or deceptive and for which it has then issued final cease and desist orders, whether or not such persons were subject to the prior orders. 15 U.S.C. §45(m((1)(B), 88 Stat. 2200 (1975).

The possibility that the consequences which Maryland fears will occur is, we submit, not substantial enough, in view of the less drastic available alternative means of obtaining the same results, to outweigh the immediate substantial impairment of interstate competition and the interference with the interstate market which would result from the enforcement of the Maryland law if it is allowed to stand.

CONCLUSION

For the reasons set forth above, we submit that the Court should note probable jurisdiction in these cases.

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